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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

TIMOTHY O'HARA,

Plaintiff and Respondent,

v.

CITY OF LONG BEACH,

Defendant and Appellant.

B284433

(Los Angeles County
Super. Ct. No. BC521272)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Terry A. Green, Judge. Reversed.

Charles Parkin, City Attorney, Monte Machit, Assistant City
Attorney; Alderman & Hilgers, Allison R. Hilgers, and Daniel S.
Alderman for Defendant and Appellant.

Law Offices of Gregory W. Smith, Gregory W. Smith;
Christopher Brizzolara; Benedon & Serlin, Douglas G. Benedon,
and Wendy S. Albers for Plaintiff and Respondent.

The City of Long Beach (the City) appeals from the judgment entered in favor of former Long Beach Police Department (LBPD) Officer Timothy O'Hara following a jury trial on O'Hara's cause of action for retaliation in violation of Labor Code section 1102.5 (section 1102.5). We agree with the City that the evidence was insufficient to support the jury's special verdict that the City retaliated against O'Hara for disclosing alleged violations of law by employees of another City department.¹ Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL SUMMARY

A. *Background*

In January 1993, O'Hara joined the LBPD as a police officer and served as a patrol officer and a member of special enforcement units, including narcotics and SWAT teams. In 2004, the LBPD promoted O'Hara to sergeant. In 2007, he was recruited for the LBPD dive team and later selected for the Long Beach Port Police Unit (the PPU). There, he was reunited with his close friend Sergeant Steve Smock, whom O'Hara had met in the police academy.

The PPU provides police services dedicated to the Port of Long Beach. LBPD officers consider the PPU, which in 2011 had 24 members, a coveted and prestigious assignment because of its location, training opportunities, and its range of unique and interesting duties. PPU officers, including O'Hara, earned bonus pay and guaranteed overtime not available to other LBPD officers.

¹ Because we reverse the judgment based on insufficient evidence, we do not address the City's contentions that the court erred in failing to instruct the jury with a business judgment special instruction and that the jury's award of noneconomic damages was excessive.

The Harbor Department of the City paid for a portion of the PPU's services. The Harbor Department also employs its own security officers for the Port of Long Beach in a 20 to 25 member harbor security unit (HSU). According to O'Hara, HSU officers are not "sworn" police officers; they are essentially "security officers" with limited police powers and duties.

The HSU and PPU had dive teams who worked in close proximity to each other. The PPU dive team performed underwater police work and counter-terrorism services, while the HSU dive team provided underwater maintenance services for the Port of Long Beach.

Jim McDonnell, Chief of the LBPD between 2010 and 2014, wanted to merge the HSU and PPU into one unit within the LBPD under his command. McDonnell, however, was unable to merge the two units because of resistance from the Harbor Department management. McDonnell also sought an increase in the Harbor Department's payments for police services at the Port of Long Beach.

B. O'Hara's Complaints of Misconduct by HSU Members and City Audits of the HSU

Between 2010 and 2011, disagreements and tension arose between the PPU and HSU dive teams. O'Hara and Smock suspected that HSU dive team members, including dive team supervisor Lamar Howard, had falsified time records and received unearned overtime compensation. Also, O'Hara witnessed HSU members holding themselves out as police officers by dressing like officers and performing detentions that he believed the officers did not have authority to make.

In early 2011, O'Hara reported these activities to his LBPD superiors, Commander Robert Luman and Lieutenant Jeffery Liberman. Luman reported the activity to his "supervisors, either

Deputy Chief J.J. Craig, Laura Farinella, and/or Chief McDonnell.” During meetings regarding the Port of Long Beach, Luman discussed that his sergeants had reported that the HSU dive team was involved in criminal activity. Luman did not recall, however, that McDonnell was at any meeting where such reports were discussed.

McDonnell testified that he was aware of the adversarial relationship between the PPU and HSU dive teams “since day [one].” He also knew that PPU members had complained that HSU dive team members were “trying to . . . look like police officers” and complaining about “the uniforms they were wearing.”

At some point, Sergeant Smock filed an anonymous written complaint about the HSU dive team with the City auditor’s office, which commenced an audit of the HSU in February 2011. As part of the investigation, City auditors interviewed personnel at the Port of Long Beach, including O’Hara. O’Hara told a City auditor about the HSU dive team’s falsification of time cards.

In August 2011, the City auditor’s office completed its investigation, finding “unjustified” and undocumented overtime by HSU dive team members.² The HSU supervisors, the City auditor’s report stated, “were unable to account for how the [d]ive [t]eam spent a majority of their time, including overtime.” The findings of the audit generated negative press coverage for the Harbor Department.

² A separate investigation by the City auditor’s office revealed that Howard was “double-dipping”: getting paid overtime for being a member of the HSU dive team and getting paid by the City as a dive instructor providing instruction to the members of the dive team. This finding resulted in a criminal investigation of Howard.

After the audit was released, LBPD Commander Luman, who desired “peaceful” relations with the HSU, told his staff, including O’Hara and Smock, that he would be “disappointed if any of [his] guys had anything to do with this audit,” and that there would “be issues if [he found] out any of [his] guys were involved.”

Although the names of the individuals who provided information to the City auditor’s office were not disclosed in the audit, LBPD Lieutenant Liberman believed that Smock and O’Hara had instigated the audit, and HSU personnel suspected they were involved in the audit. As a result, HSU dive team members began treating Smock and O’Hara “differently” and, Smock testified, it became “very difficult to work in and around the workplace.”

McDonnell was briefed on the audit of the HSU and the criminal investigations it triggered. He was, however, unconcerned about the audit because it had “no direct correlation to [the LBPD]” and did not affect the HSU’s funding of PPU services. Indeed, McDonnell said he would “applaud somebody initiating an audit or investigation where they [felt] something could be done better”; and participation in the audit “would show leadership.”

C. Howard’s Complaint Against O’Hara and Smock

On September 27, 2011, approximately six weeks after the City’s audit was published, HSU dive team supervisor Howard initiated a personnel complaint against O’Hara and Smock, alleging racial harassment and inappropriate and offensive conduct (the Howard complaint). O’Hara and Smock denied the allegations of misconduct and believed the complaint was filed in retaliation for the audit because Howard allegedly told O’Hara he would “get [him] for talking” to the City auditor’s office. On September 30, 2011, the LBPD internal affairs division opened an investigation into the Howard complaint.

D. *Complaint About O'Hara's T-shirt*

On September 29, 2011, O'Hara attended a mandatory sexual harassment training seminar where he wore a T-shirt with the following printed on the back: "WYOMING TACTICAL SUPPLY, CODY USA, [¶] Not to be confused with Wyoming Testicle Supply. They're nuts!" Sherriel Murry, the City's human resources officer, who conducted the seminar, approached O'Hara after the training and told him that she thought the T-shirt was inappropriate. O'Hara apologized, offered to take the shirt off, and told Murry that she would never see him wear it again.³ Murry, however, did not believe O'Hara was taking the conversation seriously. The Long Beach Fire Department's Captain, Pat Willis, stood next to O'Hara when he spoke to Murry. Willis testified that O'Hara was not discourteous or rude to Murry, and that O'Hara seemed remorseful for wearing the T-shirt.

The day after the seminar, Murry complained to the LBPD about O'Hara's T-shirt (the T-shirt incident). At that time, Murry was unaware that O'Hara had complained about the conduct of HSU members or that he participated in the City's audit. On October 3, 2011, Commander Luman issued O'Hara a "documented counseling" to O'Hara admonishing him for wearing a shirt that was "not professional and conducive to our work place environment," and reminding him to abide by the provisions of

³ At trial, O'Hara explained that he was at home on his day off when he got a telephone call reminding him of the sexual harassment seminar. O'Hara quickly left home to attend the seminar. When he arrived, he realized he was wearing the T-shirt and, realizing that others might think it was inappropriate, decided to sit near the back of the room. O'Hara did not give this explanation to Murry at the time of the incident or to the internal affairs investigators.

the LBPD manual regarding clothing and appearance.⁴ Murry's complaint about the T-shirt was also referred to internal affairs.

E. *The Internal Affairs Investigations of the Howard Complaint and the T-shirt Incident*

The internal affairs investigations of the Howard complaint and the T-shirt incident took place concurrently, but independently. In March 2012, internal affairs investigators interviewed O'Hara and Smock about the Howard complaint. Internal Affairs Commander David Hendricks and Internal Affairs Lieutenant Robert Smith participated in O'Hara's interview.⁵ During his interview, O'Hara stated that he had reported to the City auditor's office that members of the HSU dive team had committed misconduct. During 15 interviews conducted in the Howard complaint investigation, witnesses stated that Smock and O'Hara reported the misconduct and caused the City's audit. The fact that O'Hara had complained about HSU dive team members' misconduct was also mentioned in multiple documents from the Howard complaint internal affairs investigation file. O'Hara understood that the information contained in the internal affairs interviews regarding the Howard complaint would have "gone up

⁴ Section 3.23 of the LBPD manual provides: "No tank tops, T-shirts with inappropriate logos or images . . . will be worn. [¶] . . . [¶] . . . Personnel who report to training inappropriately attired or groomed will be ordered to go home and make a suitable change."

⁵ Because the Howard complaint involved employees of different city departments, it was decided an outside law firm should conduct the interviews. LBPD internal affairs investigators were privy to the information disclosed during the investigation of the Howard complaint.

the chain of command” to McDonnell.⁶ McDonnell, however, testified that he had no knowledge of O’Hara’s involvement with the City’s audit or that O’Hara had complained about HSU officers abusing overtime until he read a September 2012 memo regarding the Howard complaint.

Regarding the T-shirt incident, internal affairs investigators interviewed Murry (the sexual harassment seminar leader) and an administrative analyst for the City’s human resources department. According to the City’s analyst, O’Hara’s shirt was inappropriate for the workplace and the seminar. Although internal affairs investigators attempted to schedule an interview with O’Hara, he was unavailable on the proposed dates and was never interviewed. Nor did the investigators interview Willis, the Fire Captain who witnessed the interaction between Murry and O’Hara at the seminar.

LBPD Lieutenant Liberman prepared an August 5, 2012 “letter of transmittal” to McDonnell about the T-shirt incident. In the letter, Liberman notified McDonnell that the allegation against O’Hara for inappropriate attire in the workplace had been sustained as a violation of LBPD’s manual section 3.23. (See fn. 4, *ante*, p. 7.) The letter also informed McDonnell that O’Hara’s internal affairs history reflected no sustained allegations or prior misconduct. The letter of transmittal did not reference O’Hara’s involvement in the City’s audit or his prior complaints to his superiors about HSU members’ misconduct, but did refer to the ongoing internal affairs investigation of the Howard complaint:

⁶ The City’s counsel objected to O’Hara’s testimony that he understood that the interviews would go up the chain of command as speculation. The court overruled the objection stating, “It’s his understanding.”

“There is currently an active, unrelated [i]nternal [a]ffairs investigation of Sergeant O’Hara involving allegations of creating a hostile working environment.”

1. *The decision to discipline O’Hara for the T-shirt incident*

In determining officer discipline, McDonnell would confer with others in the chain of command, such as the commander and others who oversaw the accused officer’s department. In this case, Commander Luman, Lieutenant Lieberman, Internal Affairs Lieutenant Smith, Internal Affairs Commander Hendricks, and Deputy Chief Laura Farinella attended the “final briefing”⁷ on the T-shirt incident on August 15, 2012. During that meeting, no one mentioned O’Hara’s involvement in the City’s audit or his complaints about the HSU.

McDonnell testified that when he made the decision to discipline O’Hara for the T-shirt incident, he had no knowledge of O’Hara’s involvement with the City’s audit or that O’Hara had complained about HSU officers abusing overtime, and that O’Hara’s complaints about the HSU did not contribute to his decision. After the final briefing, McDonnell proposed that O’Hara receive a two-day suspension and be transferred out of the PPU. At trial, McDonnell explained why he selected this punishment: “To change behavior, first of all, not only for the individual but for peers

⁷ Under the LBPD practices, after internal affairs completes an investigation of a complaint, it is reviewed by the command staff and if the charges are sustained, the appropriate discipline is discussed at a “final briefing” with the chief of police and the command staff. There was no evidence presented at trial as to whether the command staff and McDonnell met as a group to consider the T-shirt incident prior to the “final briefing.”

and others who are watching this throughout the organization to make a very clear statement as to what's acceptable and what's not acceptable. And in this case, wearing a T-shirt like this to sexual harassment training, clearly not acceptable." The conduct, he added, showed "a lack of leadership, a lack of maturity"; it "is basically insulting the process." The facts that O'Hara was a sergeant in a supervisory position and that the incident reflected poorly on the LBPD also factored into the decision.

On August 21, 2012, McDonnell notified O'Hara of the decision.⁸

2. The decision to discipline O'Hara and Smock for the Howard complaint

In September 2012, approximately one month after McDonnell's decision on the T-shirt incident, McDonnell received the internal affairs letter of transmittal regarding the Howard complaint. According to that letter, the allegation against O'Hara and Smock for discourteous, disruptive, and/or harassing conduct toward HSU members was sustained, and the allegation for "inappropriate and offensive race[] based comments" toward Howard was not sustained.⁹ The letter further informed McDonnell

⁸ On August 31, 2012, McDonnell notified O'Hara that the proposed discipline had been revised to include removing him from the dive team as well. McDonnell revised the discipline because he did not realize that transferring O'Hara out of the PPU did not automatically remove him from the dive team, and he wanted O'Hara removed from the dive team.

⁹ Our record does not indicate when this letter of transmittal was sent or received. The first page of the letter bears a date of September 11, 2012. Pages 2 through 10, however, include a header reflecting a date of September 25, 2012. McDonnell did not state when he received the letter.

that: “There appears to be a perception on the part of the [HSU] as to the role that Smock and O’Hara played in the City [a]uditor[']s investigation of overtime by the [HSU] [d]ive [t]eam. The evidence within this case suggests there was sufficient cause for the City [a]uditor to launch an investigation into the overtime issue, however[,] utilizing Smock and O’Hara to participate and assist in that investigation with the City [a]uditor has further created animosity between these two sergeants and the [HSU].” According to McDonnell, he did not become aware that O’Hara or Smock had talked to the City auditor’s office or had complained about the HSU until he received this letter.

On September 18, 2012, McDonnell proposed that O’Hara and Smock receive a four-day suspension and removal from the PPU and the dive team as discipline for the sustained allegation of their discourteous, disruptive, and/or harassing conduct toward HSU members.¹⁰ At trial, McDonnell stated that he wanted to remove Smock from the PPU and the dive team because McDonnell “was not getting the leadership from either of these sergeants that [he] hoped to get” and there was “an adversarial relationship between two critical entities for port security, and . . . the right things weren’t being done to bring the two together as one team.” When asked if one of the reasons for the “friction between [the HSU] and the two sergeants” was that the sergeants were complaining that HSU personnel “were impersonating police officers, stopping people in traffic stops, doing things with overtime they shouldn’t be doing,” McDonnell responded: “Certainly there

¹⁰ Although McDonnell had already proposed removing O’Hara from the PPU and the dive team based on the T-shirt incident, McDonnell proposed the discipline again “[t]o ensure that it occurred.”

was the contention and there was blame on both sides of this thing. It was like a high school locker room”; “that was an issue.”

After Smock learned that McDonnell decided to transfer him from the PPU, Smock complained to the City auditor’s office that McDonnell had targeted him as a whistleblower. Smock told the City auditor’s office that documents in the internal affairs investigation on the Howard complaint connected him and O’Hara to the audit. After that, on November 8, 2012, Smock and O’Hara received an email indicating, without explanation, that the final disposition in the Howard complaint as to all allegations was “[n]ot [s]ustained,” and that they would not be disciplined.

F. *O’Hara’s Discipline for the T-shirt Incident Becomes Final, and He Is Transferred from the PPU*

O’Hara appealed the discipline imposed for the T-shirt incident, and after his *Skelly* hearing,¹¹ the discipline became final in October 2012. O’Hara was transferred to the LBPD’s West Division, where he was made acting lieutenant overseeing 20 to 30 patrol officers and designated to represent the West Division in public forums. In his new assignment, O’Hara earned about \$30,000 less in overtime compensation than he did in the PPU. He was also denied assignments for which he was qualified, and subjected to new internal affairs investigations, including more complaints from HSU members, and new documented counselings.

¹¹ A hearing held pursuant to *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, provides an opportunity for an accused officer to be heard before discipline becomes final.

G. *The City's Civil Service Commission Overturns the Discipline and Directs O'Hara to be Reinstated to the PPU*

O'Hara appealed the disciplinary actions imposed based on the T-shirt incident to the City's Civil Service Commission (the Commission). In August 2013, the hearing officer of the Commission affirmed the two-day suspension as adequate to address the T-shirt incident, but concluded that transferring O'Hara from the PPU and removing him from the dive team were "disproportionate to the suspension" and "not supported by the evidence."¹² The Commission ordered the LBPD to reinstate O'Hara to the PPU and the dive team.

H. *O'Hara Returns to the PPU, Retires, and Files a Whistleblower Retaliation Lawsuit Against the City*

In the spring of 2014, the LBPD reinstated O'Hara to his former position in the PPU and the dive team. O'Hara had, however, missed more than a year of specialized training with the PPU and was denied overtime assignments. In April 2015, O'Hara took a medical leave for neck surgery and, after he recovered, decided not to return to work because he did not believe he would ever be completely accepted by his superiors or able to get his career back on track. O'Hara retired in 2016, earlier than he had intended.

On September 13, 2013, O'Hara filed a civil action alleging causes of action against the City for whistleblower retaliation (§ 1102.5), violation of the Peace Officer's Bill of Rights (POBR) (Gov. Code, § 3300 et seq.), and sex discrimination in violation

¹² The City's appeal from the Commission's decision was denied.

of the Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940). The court granted summary adjudication in the City's favor on the POBR and FEHA causes of action. O'Hara's remaining cause of action for whistleblower retaliation under section 1102.5 proceeded to trial, where the jury found in favor of O'Hara and awarded him \$282,246 in past economic damages, \$411,089 in future economic damages, \$750,000 in past noneconomic damages, and \$250,000 in future noneconomic damages, for a total award of \$1,693,335.

After the court denied the City's post-trial motions for a new trial and judgment notwithstanding the verdict, the City timely appealed.

DISCUSSION

The City challenges the sufficiency of the evidence supporting the jury's special verdict in favor of O'Hara on his claim for whistleblower retaliation under section 1102.5. On appeal, the City does not dispute the jury's findings that O'Hara engaged in protected activity under section 1102.5 by disclosing information in the City's audit investigation of the HSU. Likewise, the City does not contest that transferring O'Hara out of the PPU and removing him from the dive team as discipline for the T-shirt incident was an adverse employment action. The City argues that the evidence was insufficient to prove that O'Hara's protected activity had a causal connection to his discipline.

A. *Standard of Review*

"When a party contends insufficient evidence supports a jury verdict, we apply the substantial evidence standard of review." (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) "We must 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference

and resolving all conflicts in its favor.’ ” (*Ibid.*) To be reasonable, “inferences must be ‘a product of logic and reason’ and ‘must rest on the evidence’ [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding.” (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) Although review under the substantial evidence standard “begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the [verdict]” (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571), “this does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment. . . . A decision supported by a mere scintilla of evidence need not be affirmed on review.” (*Kuhn v. Department of General Services, supra*, 22 Cal.App.4th at p. 1633.) “The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record.” (*Ibid.*)

B. Analysis

Section 1102.5 is California’s “whistleblower statute, the purpose of which is to ‘encourag[e] workplace whistle-blowers to report unlawful acts without fearing retaliation.’ ” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 287; see also *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1548 [section 1102.5 “protects an employee from retaliation by his employer for making a good faith disclosure of a violation of federal or state law”].) Section 1102.5, subdivision (b) provides, in relevant part, that “[a]n employer . . . shall not retaliate against an employee for disclosing information . . . to a government or law enforcement agency . . . if the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation of or noncompliance with a local, state, or federal rule or

regulation.” A report of illegal conduct by a public agency employee to his or her employer constitutes a protected disclosure under the statute. (§ 1102.5, subd. (e); *Mize–Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 856–857.)

“To establish a prima facie case of retaliation, the plaintiff ‘must show (1) [he or] she engaged in a protected activity, (2) [the] employer subjected [the plaintiff] to an adverse employment action, and (3) there is a causal link between the two.’ ” (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 468.) “ ‘Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity.’ ” (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 70.) “A person cannot retaliate against someone for activity the person does not know about.” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1072.)

Here, the City contends that there is no substantial evidence that McDonnell knew of O’Hara’s protected activity at the time he made the decision to discipline him. We agree.

McDonnell was solely responsible for the disciplinary decision. He testified that at the time he made the decision he did not know of O’Hara’s involvement with the City’s audit or of his complaints about HSU officers abusing overtime. This testimony is supported by the testimony of attendees of the final briefing regarding the T-shirt incident, as well as the documentary evidence of the investigation. In particular, the internal affairs letter of transmittal to McDonnell regarding the T-shirt incident makes no mention of any complaints by O’Hara concerning the audit or illegal activity committed by HSU personnel.

O’Hara does not point to any direct evidence contradicting McDonnell’s testimony. He contends, however, that circumstantial evidence and inferences drawn therefrom support the verdict.

First, he states that the internal affairs investigation of the T-shirt incident began shortly after he reported illegal activities of the HSU dive team. The internal affairs investigation, however, began promptly after the T-shirt incident itself, and the proximity in time to O'Hara's earlier complaints of illegal activity cannot reasonably imply that the internal affairs investigation was initiated because of the prior complaints. Moreover, Murry, the person who initiated the complaint about the T-shirt incident, had no knowledge at that time of O'Hara's prior complaints about the HSU.

Next, O'Hara refers to Commander Luman's comment to PPU members that there would "be issues if [he] found out any of [his] guys were involved." Even if this is construed as implying that Luman would create "issues" for a PPU member who was involved in the audit, there is no substantial evidence that Luman ever informed McDonnell that O'Hara was involved in the audit. Luman testified that he reported the HSU's "criminal activity" to "either Deputy Chief J.J. Craig, Laura Farinella, and/or Chief McDonnell." When questioned further, Luman stated that he did not "know if [he] made that notification to Chief McDonnell," and he could "only make an assumption that [his] boss [Farinella] would tell her boss [McDonnell]." This testimony suggests, at most, the possibility that Luman told McDonnell, which is insufficient to contradict or conflict with McDonnell's testimony that he did not know of the complaints. (See *People v. Wallace* (2017) 15 Cal.App.5th 82, 95 ["a mere possibility does not rise to the level of substantial evidence"]; *People v. Ramon* (2009) 175 Cal.App.4th 843, 851 ["a mere possibility is nothing more than speculation" and "[s]peculation is not substantial evidence"].)

O'Hara also points to statements made in the internal affairs investigation of the Howard complaint. The internal affairs investigators in that case, O'Hara asserts, "reported directly

to McDonnell.” There is, however, no evidence that anyone investigating the Howard complaint ever informed McDonnell of the witness statements made in that investigation prior to McDonnell’s decision regarding the T-shirt incident. The suggestion is speculation, not substantial evidence. (See *Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1104 [speculation and conjecture do not constitute substantial evidence].) The same conclusion applies to O’Hara’s testimony that it was “his understanding” that the information in the Howard complaint files would have “gone up the chain of command” to McDonnell. O’Hara’s factually unsupported understanding does not create a conflict with McDonnell’s testimony.

O’Hara also points to McDonnell’s testimony that he was aware of the acrimonious relationship between the PPU and the HSU and that there was “an issue” regarding Smock and O’Hara complaining that HSU personnel were acting like officers and “this overtime issue.” This testimony, however, was given during questioning about Smock’s discipline pursuant to the Howard complaint. By the time McDonnell imposed the discipline for that complaint, he had received the internal affairs letter of transmittal about that complaint, which informed McDonnell that HSU personnel perceived “that Smock and O’Hara played [a role] in the City [a]uditor[']s investigation of overtime by the Port Dive Team.” McDonnell’s testimony regarding his knowledge of complaints at that time does not constitute substantial evidence that he had knowledge of such complaints at the time he made the prior disciplinary decision regarding the T-shirt incident.

O’Hara also refers to what he describes as the “disparity between [his] behavior and the severity of the discipline,” and points to the Commission’s subsequent finding that removal from the PPU and the dive team was excessive. Indeed, the removal

of O'Hara from one post and his placement in another within the LBPd does not appear to be reasonably related to O'Hara's wearing of the T-shirt at a sexual harassment seminar. McDonnell also explained, however, that O'Hara's removal from the PPU was necessary to "get some leadership in there that would try and mend the fences" "[w]ith the Harbor Department." Although McDonnell was not aware of O'Hara's complaints of illegal activity, he was aware of the acrimonious relationship between the PPU and HSU "since day [one]." Removing O'Hara in order to reduce that acrimony is not unlawful retaliation. Although McDonnell stated that he was aware of complaints about the uniforms that HSU officers wore, and that they were trying to "look like police officers," there was no substantial evidence that HSU officers' uniforms or their conduct as harbor security officers violated any law or that O'Hara could have reasonably believed that it did. Although the authority of harbor or port police officers is not as broad as the authority of the City's police officers, they are nevertheless "peace officers" and statutorily authorized to make arrests under specified circumstances. (Compare Pen. Code, § 830.1 [authority of the city police officers] with *id.*, § 830.33, subd. (b) [authority of "[h]arbor or port police"].) O'Hara has not referred us to any law that prevented HSU officers from wearing the uniforms they wore or precluded them from making the detentions he alleged were unauthorized. Thus, although O'Hara's complaints about HSU officers on these grounds may have been a source of the broken fences that McDonnell sought to mend, they do not support a whistleblower cause of action.

Lastly, O'Hara argues that even if McDonnell did not know of his involvement in the audit at the time McDonnell made the September 2012 decision regarding the T-shirt incident, the City does not dispute that he became aware of it by the time the

discipline became final in October 2012. The pertinent causal relationship, however, is between McDonnell's knowledge of O'Hara's involvement in the audit and his decision to punish O'Hara for the T-shirt incident. The fact that McDonnell learned of the complaints after his decision and before it became final does not establish causation.

Based on our review of the entire record, we conclude that the evidence is insufficient to support the verdict that the City disciplined O'Hara for engaging in activity protected under the whistleblower statute. Accordingly, we reverse the judgment.

DISPOSITION

The judgment is reversed. Appellant is awarded its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

WEINGART, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.